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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PEDRO SALVADOR ROMERO, Defendant and Appellant.	B203221 (Los Angeles County Super. Ct. No. VA093525)

APPEAL from a judgment of the Superior Court of Los Angeles County. Phillip H. Hickok, Judge. Affirmed.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael C. Keller and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Pedro Salvador Romero (appellant) of attempted murder (Pen. Code, §§ 664, 187, subd. (a))[1] (count 1); mayhem (§ 203) (count 2); and shooting at an occupied motor vehicle (§ 246) (count 3). The jury found that appellant personally used and discharged a firearm causing great bodily injury in all three counts. (§ 12022.53, subds. (b), (c), (d).)

The trial court sentenced appellant to the high term of nine years for the attempted murder and 25 years to life for the firearm use under section 12022.53, subdivision (d). The trial court stayed punishment in counts 2 and 3 pursuant to section 654.

Appellant appeals on the grounds that: (1) the pretrial photographic lineups were improperly administered and unduly suggestive in violation of appellant's right to due process under the Sixth and Fourteenth Amendments of the United States Constitution; and (2) the trial court abused its discretion in admitting appellant's gang affiliation where prejudicial effect outweighed any probative value.

FACTS

On December 26, 2005, Jose Tapia (Tapia) was visiting his wife in her Virginia Avenue residence in South Gate where she lived with her brother, David Arellano (David), and sister, Annely Arellano (Annely), as well as other family members. Tapia and Annely were going to the store, and Tapia was standing outside the door, waiting for Annely. He saw David sitting in his parked car, a gold Infinity, which was parked in an alley across the street. David was listening to music and smoking a small amount of marijuana.

As David sat in his car, he saw a dark green Pontiac with its lights out coming down the alley. The Pontiac stopped next to his car, on the other side of the alley. Two young men with their hair shaved short were in the front seat. Tapia was approximately 30 feet from the two cars. It was nighttime, but there were lights where David's car was parked.

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1 All further references to statutes are to the Penal Code unless stated otherwise.

Because David was afraid the men in the green car would think there was no one in his car and try to steal something, he turned his car lights on.

David saw the driver's side door of the green car open. The male driver got out, walked around the back of his car, and approached the passenger window of David's car. Tapia could see the man's face. The driver pulled out a small, black gun and pointed it at David's head. He said, "What's up?" or "What's up, dog?" David put the car in drive and started to pull out. The man shot David, and as David pulled away, the man shot four or five times at the back of David's car. David felt the first bullet enter his left temple and go out his left eye. He immediately lost his eyesight. David's car crashed into a wall and a parked car. He never regained his eyesight.

The shooter got back in the car and drove towards Tapia, who was going towards David's car. The shooter passed within seven and one-half feet of Tapia. The driver told Tapia in Spanish that "nothing had happened." Annely heard someone yell "nothing happened here." The shooter then drove the green car down Virginia Avenue. Tapia pointed at appellant in court as the person who shot David.

David often parked in the same alley and had never noticed anything happening there. There was always a lot of graffiti, however, specifically for the Lynwood Dukes gang. He had never before seen the man who shot him. David had never been in a gang and had never had trouble with anyone from a gang.

Tapia identified the type of car the shooter drove from photographs shown him by detectives. Later, a detective brought him a single picture of a green car, and Tapia identified the car as looking like the one the shooter was driving.

Officer Edward Huffman (Huffman) of the South Gate police made a flier based on the witnesses' descriptions of the green car and the suspect and the flier was distributed to other law enforcement agencies. The Los Angeles County Sheriff's Department, Century Station, contacted Huffman about stopping a suspect on January 1, 2006, in a matching vehicle. The suspect was appellant. Huffman obtained a booking photograph of appellant and placed it in a six-pack.

Huffman showed the six-pack to Tapia. When shown the admonition form that he signed at the time of identifying the photographs, Tapia remembered seeing it and signing it. The detective told Tapia it was possible "that [he] would see [the shooter] or not" among the photographs. Tapia picked out appellant immediately upon looking at the photographs. He placed his initials under the third photograph, which was appellant's. Tapia had never seen appellant before. Annely also selected appellant's photograph from the six-pack and said she was 80 percent sure of her choice.

After appellant was identified by the witnesses, Huffman and other officers went to a Sylmar apartment looking for appellant. They saw the dark green car, a Pontiac Grand Am, at the location. In appellant's bedroom, the officers found photographs of appellant and others throwing gang signs. There was a stop sign and a block of wood with writing on it that pertained to the Lynwood Dukes.

Officer Derek O'Malley (O'Malley) is part of the gang unit for the City of South Gate. Lynwood Dukes is one of his target gangs. The area of Virginia Avenue and Tweedy Boulevard is within their territory. That area is on the border of other gang territories and is claimed by other gangs. O'Malley had never had contact with appellant. He reviewed field interview (FI) cards filled out by other South Gate officers that document appellant as claiming Lynwood Dukes. His moniker is Chonchie. When given a hypothetical question based on the facts of the instant case, O'Malley stated the crime was a gang crime caused by a perceived "disrespect."

When police searched the green Pontiac on January 19, 2006, they found bullets and a loaded magazine under the locking mechanisms of the front doors. On that date, appellant was with Jessica Barajas (Barajas), who is the registered owner of the car. Bullets were also found under the backseat.

Defense Evidence

Barajas is not actually married to appellant but has been with him for five years. They were going to get married the weekend he was arrested. Appellant was with Barajas and their six-month-old son at the San Fernando J.C. Penney store on the night of the

shooting. Appellant went to help carry the child, since Barajas was five months pregnant. After shopping, they all went to eat and returned home. The bullets found in her car did not belong to her. Appellant never drove Barajas's car when she was not in it. A friend was driving Barajas's car when appellant was stopped in the car on January 1, 2006, in South Gate. Barajas was not there.

DISCUSSION

I. Pretrial Identifications

A. Appellant's Argument

Appellant contends that neither of the prosecution's lead witnesses was properly admonished that the shooter might or might not be among the photographs they viewed. The witnesses were not told that they were under no obligation to choose anyone. According to appellant, there can be little doubt that Tapia and Annely felt obligated and under pressure to select someone and that they believed the shooter's photograph was among the selection. As a result, the subsequent in-court identifications were also unreliable, and appellant's right to due process was violated.

B. Relevant Authority

"'In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.' [Citation.]" (*People v. Kennedy* (2005) 36 Cal.4th 595, 608 (*Kennedy*); see also *Manson v. Brathwaite* (1977) 432 U.S. 98, 106–114.) We independently review a trial court's determination on this issue. (*Kennedy*, *supra*, at pp. 608–609 [the constitutionality of an

identification procedure is a mixed question of law and fact and subject to independent review].)

The defendant bears the burden of demonstrating that the identification procedure was unreliable. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989 (*Cunningham*).) The defendant must show "unfairness as a demonstrable reality, not just speculation." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

C. Proceedings Below

Tapia said his wife acted as an interpreter in one of his meetings with police, and Annely did so another time. Huffman said that he believed one of Tapia's nieces translated for Tapia during the photographic identification. There was no official interpreter, and none of the officers spoke Spanish. Tapia read the admonition contained in People's exhibit 1, which was printed in Spanish. He remembered seeing it and signing it. He remembered the detective telling him that he might or might not see the shooter. He remembered spotting appellant's photograph immediately. Tapia said on cross-examination that he did not remember what the officers may have told him when they showed him the photographs.

Annely did not remember the officers telling her she might or might not see the shooter in the photographs. She signed the admonition form, and she wrote on the form that she had selected picture No. 3 because, "it seemed to me that this individual was the one who shot the car. Because he had the same descriptions that I had seen." She recognized the haircut, the weight, and what he was wearing. Annely acknowledged that she could not see the shooter's face very well because she needs glasses and was not wearing them. But she was able to describe "more or less what he looked like physically," and she recalled that he was a little chubby.

Defense counsel asked Annely to read the admonition that she had initialed and explain what she understood the instructions to say. She said, "Okay. The first one says that I will look at photos, but that, well, that the photos, that they will show me are not influenced—or the first one I don't understand what they mean. But the last one does say

that I should not talk about the photos with anyone." She did not recall if she was given the opportunity to read the admonition in Spanish.

Annely said she had an interpreter at trial because, although she understands English, she sometimes is not able to speak it very well. She acknowledged having difficulty reading the form in English and understanding it.

On redirect Annely said that she was alone with the two detectives and neither of them told her or suggested to her to pick No. 3. She believed some of the men in the six pictures looked alike, but she was 90 percent sure that none of the five men she did not select was the shooter. Although the admonition in English was "kind of confusing," she knew what she was writing. She did not feel that she had to pick somebody. She was comfortable speaking with the detectives in English.

D. No Error or Violation of Due Process

There is no evidence in the record that detectives who showed Tapia and Annely the six-packs said anything to these witnesses to suggest that the individuals they would be viewing included the shooter. Tapia said he read the admonition given to him by the police, and the admonition form is printed in both English and Spanish. The form itself shows that Tapia signed at the bottom of the Spanish version of the admonition, which indicates he read and understood the Spanish version. Although the officers showing Tapia the photographs did not speak Spanish, a relative translated for him. He remembered that the officers told him he might or might not see the shooter among the photographs in the six-pack. It is true that Tapia could not repeat what the officers told him at the six-pack showing when asked to do so under cross-examination. This, however, does not equate to evidence that the officers did not admonish Tapia or that he did not understand the admonishment. Furthermore, there is no evidence that anything that was said to Tapia in English or translated into Spanish influenced his choice.

Annely could not summarize what the admonition said. Again, merely because she could not remember if the officers told her that the shooter might or might not be in the photographic lineup is not evidence that they failed to tell her this. She specifically stated

that neither of the two detectives suggested to her that she choose photograph No. 3, appellant's photograph. She further testified that, even if the admonition in English was confusing, she knew what she was writing. She was comfortable speaking with the detectives in English, and she did not feel that she had to pick somebody.

As stated in *Manson v. Brathwaite*, *supra*, 432 U.S. at page 116, "we cannot say that under all the circumstances of this case there is 'a very substantial likelihood of irreparable misidentification.' [Citation.] Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." The case of *Cunningham*, *supra*, 25 Cal.4th at pages 989–990, cited by appellant, is not to the contrary. In that case, the court merely cited the admonition read to the witness as one circumstance among the totality defeating the defendant's claim of a suggestive lineup.

Furthermore, any potential for misidentification because of the use of a particular identification procedure is substantially lessened by cross-examination that reveals to the jury the method's potential for error. (*Simmons v. United States* (1968) 390 U.S. 377, 384.) In this case, defense counsel grilled Annely and Tapia about the identification procedure. The jury therefore had sufficient information to weigh the photographic identifications and the subsequent trial identifications. During closing argument, counsel emphasized the contradictions and possible bias in the witnesses' testimony as well as the lack of an official interpreter at the identifications. Counsel stated in various ways that if the descriptions given by the witnesses were evaluated, the jury members would come to the conclusion that appellant was not guilty of the offenses.

We also reject appellant's due process claim. "'A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police.' [Citation.] As there is no showing of a suggestion of the identity of defendant in the circumstances of the [identification] in this case, defendant has failed to establish the

procedure was unfair [citation], and his claim that the confrontation infringed due process protections must be rejected." (*People v. Hunt* (1977) 19 Cal.3d 888, 894; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 412 ["In other words, '[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends].)'"

II. Gang Evidence

A. Appellant's Argument

Appellant contends the trial court prejudicially abused its discretion by admitting testimony that he was a gang member, particularly since this was not a gang case, and motive is not an element of the offense. According to appellant, the evidence focused the trial on appellant's criminal disposition and overshadowed the identity issue, which was the crux of the case. The evidence swayed the jury to convict, and it is reasonably probable appellant would have obtained a more favorable result had the evidence been excluded.

B. Relevant Authority

Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence Code section 210 defines "'relevant evidence'" as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." "The test of relevancy is whether the evidence tends, logically, naturally, or by reasonable inference to establish a material fact, not whether it conclusively proves it." (*People v. Yu* (1983) 143 Cal.App.3d 358, 376.) "[A]ll relevant evidence is admissible, unless excluded under the federal or California Constitution or by statute." (*People v. Scheid* (1997) 16 Cal.4th 1, 13; see Evid. Code, §§ 350, 351.)

Gang evidence is inadmissible if introduced only to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]" (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, "trial courts should carefully

scrutinize such evidence before admitting it. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Gurule* (2002) 28 Cal.4th 557, 653.) A trial court's admission of evidence, including gang testimony, is reviewed for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547.)

Evidence Code section 352 provides that a trial court has discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." The requisite prejudicial effect is not simply any "'damaging'" effect. (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Rather, it is an effect that """uniquely tends to evoke a emotional bias against a party as an individual, while having only slight probative value with regard to the issues."""" (*People v. Smithey* (1999) 20 Cal.4th 936, 974.)

C. Proceedings Below

At a pretrial hearing under Evidence Code section 402, the prosecutor told the court that appellant was a known Lynwood Dukes gang member, and gang graffiti was found in his home. The victim had seen Lynwood Dukes graffiti in the area where he was shot, and the area is actually located in disputed gang territory. The prosecutor wanted to bring in a gang expert to testify that "What's up?" is a gang challenge. The prosecutor stated that this evidence was relevant to motive, and failure to introduce it would mislead the jury by not showing them there was a reason for the unprovoked attack on the victim.

Defense counsel argued that appellant may have been, at one time in his life, a gang member, but he did not know the victim and lived far away, in Sylmar. The evidence would probably show he was not the shooter.

The prosecutor supplied more information about appellant's recent arrests in South Gate, the FI cards that had been written on appellant by South Gate police officers within a year of the shooting, and the expert's information that at the time of the shooting Lynwood Dukes made "a big, big move and was on the rise."

The trial court took the issue under submission, stating it was inclined to allow it. The court believed that, although the evidence the prosecutor discussed would probably not support a gang allegation, it indicated a reason for the shooting. The trial court ultimately allowed the prosecutor to call the gang expert after listening to further argument from defense counsel on the issue of prejudice.

The prosecutor posed the following question to O'Malley: "Hypothetically, if you have a Lynwood Dukes gang member driving in a vehicle with the lights turned off at night, with at least one other occupant in the vehicle, driving in the alley between Virginia and California South of Tweedy, they drive up, driver stops the car, gets out of the car, walks over to a lone male sitting in his car who turns the lights on to let the other car know somebody's sitting in there—actually he turns the lights on to let somebody know he's sitting in there before the driver gets out. The driver gets out of the other car with the lights turned off, walks over to the man sitting in the car, says something to the effect of 'What's up' or 'What's up dog', pulls out a gun and starts shooting, based on that and the statements do you have an opinion as to whether or not that is a gang crime?"

O'Malley explained that respect is very important for a gang member and that it did not take much to disrespect someone. "It could be a look, it could be the flashing of the headlights, and if that gang member deems that he's been disrespected he has to save face, especially in the company of another gang member or even somebody on the street, doesn't have to be gang members, you have to show that you can't do that to them. And that can provoke a shooting."

The prosecutor stated in closing argument that "we heard about motive from the gang detective. He told you this was the Lynwood Dukes area. And the victim himself, David Arrellano, where he parked he saw Lynwood Dukes graffiti. And you know this is the Lynwood Dukes area. And listening to Detective O'Malley tell you about how respect is. It's a different culture than a lot of us might be aware of. But respect is a big thing with gang members. And something as simple as turning on your headlights could be a sign of disrespect, especially when you have somebody from Lynwood Dukes driving with

other gang members or other people in the car. It's a sign of disrespect. And what must be done? He must rectify it. He must get out and stop that. Whoever disrespected him."

D. Evidence Properly Admitted

The probative value of gang evidence for establishing motive has been recognized. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; *People v. Carter* (2003) 30 Cal.4th 1166, 1194 (*Carter*); *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.) Such evidence is admissible if it is logically relevant to some material issue in the case, is not more prejudicial than probative, and is not cumulative. (*Carter*, *supra*, at p. 1194.)

We conclude that the evidence of appellant's gang membership was both relevant and more probative than prejudicial, and the trial court did not abuse its discretion in admitting it. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 973.) The record shows that the trial court took the matter under submission and carefully considered the question of admissibility of the gang evidence under Evidence Code section 352.

In this case, the alleged motive for, and the circumstances surrounding, the crime were gang-related under the prosecution's theory that David "disrespected" appellant and his companion, Lynwood Dukes members, by flashing his lights when they stopped their car in disputed gang territory. Clearly the evidence about appellant's membership in Lynwood Dukes and the activities, territory, and the psychology of a gang confronted by rivals was highly probative and necessary to establish this theory. Whether a prospective gang member would earn "respect" by shooting an innocent victim is sufficiently beyond common experience that expert testimony was highly probative and necessary to the jury's understanding of the case. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 945; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551; *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1384 ["It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect'"].) California courts routinely admit gang evidence "when the very reason for the crime, usually murder, is gang related. [Citations.]" (*People v. Sanchez*, *supra*, 58 Cal.App.4th at p. 1449.) This is what occurred in the instant case. Moreover, the defense also relied on motive or lack of

motive, arguing that David did not even know appellant and vice versa. Defense counsel then argued that motive was a factor "in another way" in that the South Gate police did not like appellant. Counsel implied that, for this reason, the police linked appellant to their unsolved crime when appellant was stopped while going to a New Year's Eve party on January 1, 2006. At that time, according to the defense, the "police report possibly changes."

On the other hand, the evidence was not unduly prejudicial. O'Malley acknowledged he had never had personal contact with appellant. O'Malley spoke only briefly about Lynwood Dukes and their relationship with other gangs in the City of South Gate. He explained that the area of Virginia Avenue and Tweedy Boulevard is within the Lynwood Dukes's territory but is also claimed by other gangs, and border areas have lots of problems. He gave his reasons for believing appellant is a Lynwood Dukes member, namely the photographs found at his apartment and the contacts with South Gate police. He explained the importance of respect to gang members. Under these circumstances, where the evidence of the charged crime was far more inflammatory than the explanation of gang culture, the evidence cannot have been unduly prejudicial.

The case of *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*), relied upon by appellant, is distinguishable. In that case, the defendant argued in a new trial motion that the trial court's admission of gang evidence violated the rules of evidence, prejudiced the verdict under state law, and violated his federal constitutional rights to due process, resulting in an unfair trial. (*Id*. at pp. 217, 221–223, 228–229.) The defendant contended that sufficient evidence did not support the gang allegations, and the evidence admitted was irrelevant and prejudicial. (*Id*. at pp. 217, 222.) The trial court granted a new trial on the gang allegations only, finding the gang evidence relevant to the issue of intent for the underlying charges. (*Ibid*.) The reviewing court held that the case presented one of the rare occasions where the admission of evidence rendered the defendant's trial fundamentally unfair, and the trial court erred in failing to grant the defendant a new trial on the charges. (*Id*. at p. 232.)

As in the instant case, the *Albarran* trial court had admitted the gang evidence on the issue of motive. (*Albarran, supra,* 149 Cal.App.4th at p. 217.) Unlike the instant case, however, the gang evidence in *Albarran* was highly inflammatory. It contained references to the defendant's gang as "'dangerous,'" to the defendant's tattoo linking him to the Mexican Mafia, and to the gang's graffiti that contained specific threats to murder police officers. The gang expert spoke of a number of the defendant's fellow gang members and their arrests and criminal offenses, which were unrelated to the charged crime. (*Id*. at pp. 220–221.) The gang expert also described how the defendant had "'confessed'" to his participation in the shooting that was the source of the charges. (*Id*. at p. 221.) In addition to finding that the gang evidence was extremely inflammatory and cumulative and had no connection to the charged crime, the reviewing court believed there was nothing inherent in the facts to suggest a specific gang motive. (*Id*. at pp. 227, 228.) In the instant case, however, there was evidence that the victim was parked in disputed gang territory and had flashed his car lights at the shooter's car. The shooter immediately got out of his car and asked the victim "What's up, dog?" before shooting him in the head. There was no such seemingly disrespectful act by the victim in *Albarran*, where the shooters fired on a home in which a party was being held. (*Id*. at p. 217.)

Furthermore, the trial court instructed the jury that "[m]otive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty." (CALJIC No. 2.51.) With respect to expert testimony, the trial court told the jury that "[a]n opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based." (CALJIC No. 2.80.) The jury was told it was not bound by the opinion and that it could disregard any opinion it found unreasonable. (*Ibid.*) The trial court also cautioned the jury that, although it had allowed the prosecutor to ask a

hypothetical question, this did not mean that all of the assumed facts had been proved. It was for the jury to decide whether they were. (CALJIC No. 2.82.) "Jurors are presumed to understand and follow the court's instructions. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 662.) These instructions substantially reduced any prejudice that admission of the gang evidence may have caused.

We conclude the trial court did not abuse its discretion by admitting the limited gang evidence. Even if it were error, in light of the instructions, the eyewitness identifications and the ammunition evidence, admission of the limited gang evidence was not prejudicial to appellant under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 [reversal unless error harmless beyond reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [result more favorable to appellant not reasonably probable absent evidentiary error].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ